No. 77-1767

In the
Supreme Court of the United States
OCTOBER TERM, 1977

RISS INTERNATIONAL CORPORATION,
Petitioner,

vs.

GEORGE P. BAKER, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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George P. Baker, et al., prays that a Writ of Certiorari be denied Petitioner by this Court to review the judgment of the Supreme Court of Illinois entered on March 30, 1978 denying a petition for leave to appeal thereby affirming the judgment of the Appellate Court of Illinois entered on October 26, 1977.

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court properly denied to give full faith and credit to petitioner for its Missouri judgment which was based on a different cause of action, related to different subject matter and no nexus involving a common time, source or transaction?

STATEMENT OF THE CASE

The Plan I Tructrain Agreement sets out the charges to be paid by a participating truck line to the Penn Central for hauling the trucker's trailer, loaded or empty, on a railroad flatcar between piggyback terminals located on the Penn Central (Rec. 9-12; 16-18). The trailer-on-flatcar move is usually intermediate to over-the-road motor carrier moves at origin and destination points. Each shipment handled by Penn Central under the Tructrain Agreement is a separate and independent transaction, represented by its own documentation (C202-400). Each document (freight waybill) contains, among other data, the specific charge applicable to the shipment, as indicated by the origin and destination points on the waybill. This figure is obtained from the pricing schedule in the Tructrain Agreement (Rec. 16-17). The 199 bills with freight charges entered thereon were stipulated into evidence by the parties (Rec. 62). Witness Bubba testified that he had checked these bills against the Tructrain pricing schedule and that the billing was correct (Rec. 17-18). The total tariff charges due on these 199 bills is $41,183.02.

Defendant Riss did not introduce any witnesses. The only defense offered was a judgment rendered in favor of Riss in the Circuit Court of Missouri, 16th Judicial Circuit, Case No. 74 9169 (C27-30). This was a judgment entered in connection with a counterclaim for freight damage to shipments not involved in the instant suit. A judgment on the counterclaim was entered on 8-27-74 for $33,643.15. The Petitioner sought to have the Missouri judgment set off against the judgment entered in this suit, but the Court refused to do this. Petitioner thereupon raises the

claim on appeal that Penn Central should have included all the bills in this suit in the suit initiated by Penn Central in Missouri, because the bills in this suit had accrued in 1970 and the Missouri suit was filed on 6-29-71. They further claim that failure to do so renders those not included in the Missouri suit *res judicata.*

Respondent contends that Petitioner has not proved by the introduction of this judgment order that the Missouri action of Penn Central involves identical subject matter and an identical cause of action, since the judgment order only refers to Riss' counterclaim in that proceeding. There is no evidence concerning the subject matter, the issues or the claims of Penn Central in the Missouri suit in the record in this proceeding.

REASON FOR NOT ALLOWING THE WRIT

The writ should not be allowed because the Illinois Court properly denied to give full faith and credit to the Missouri Judgment. The two judgments were based on different causes of action involving different subject matter. Neither originating from a common time, source or single transaction. Therefore, the decision was proper under Article IV, Section 1 of the Constitution and 28 USC 1738. The decision was not contrary to this Court's holding in *Morris* v. *Jones,* 329 U.S. 545, 1947.

Morris v. *Jones (Id.)* can be factually distinguished. An unincorporated association was authorized by Illinois to transact an insurance business there and in other States. It qualified to do business in Missouri. Petitioner sued the association in a Missouri Court for malicious prosecution and false arrest. Subsequently, but before judgment was obtained in Missouri, an Illinois Court appointed a liquidator for the association and issued an order staying suits

against it. All assets vested in the liquidator. With notice of the stay order, petitioner continued to prosecute the Missouri suit, but counsel for the association withdrew and did not defend it. Petitioner obtained a judgment against the association in Missouri and filed copy as proof of his claim in the Illinois proceedings. An order disallowing the claim was sustained by the Supreme Court of Illinois and an appeal was taken to this Court.

The Court stated at page 554 of the opinion:

> "The single point of our decision is that the nature and amount of petitioner's claim has been conclusively determined by the Missouri judgment and may not be relitigated in the Illinois proceedings, it not appearing that the Missouri court lacked jurisdiction over either the parties or the subject matter."

The Court was not involved with the type of factual situation presented in the case at bar. It is clear the Court was involved with the conclusiveness of the nature and amount of the claim. In the case at bar, the nature and amount of the claim was never determined by the Missouri judgment. The evidence to support these bills was never introduced in the Missouri action. They were not the subject matter of any previous claim. Further, the subject matter of the Illinois suit was not *res judicata* when filed on 3-23-73 (C12) because no judgment had been rendered in the Missouri case until 8-27-74. The Petitioner could have easily filed a motion in either court to transfer or consolidate the claims in both actions on the ground of *forum non conveniens*. Petitioner did not choose to do so and respondent should not be penalized for petitioner's oversight.

As mentioned in the Statement of the Case, there is no evidence concerning the subject matter, the issues, or the claims of Penn Central in the Missouri suit in the record

in this proceeding. A mere plea of *res judicata* without any proof of the issues, the evidence presented, or the pleadings filed in the prior action is insufficient to establish a defense. *Barnes* v. *Barnes,* 1948, 76 N.E.2d 64; 333 Ill. App. 664: *Meeker* v. *Webner,* 366 N.E.2d 539, 1977, 51 Ill. App. 3d 716.

Petitioner asserts that the action, if brought in Missouri, would have been barred by the Missouri judgment. In so stating, he quotes from *Civic Plaza National Bank of Kansas City* v. *University Nursing Home Inc.,* 504 S.W. 2d 193 at page 200, citing several authorities, *State ex rel. Farmer* v. *Allison,* 359 S.W. 2d 245, 246-247 (Mo. App. 1962); *Sierk* v. *Reynolds,* 484 S.W. 2d 675, 681 (Mo. App. 1972); *Smith* v. *Preis, Supra,: Abeles* v. *Wurdack, Supra.* None of these cases is representative of the situation that we have in the case at bar. In all of these cases there was but one cause of action. In *Civic,* the original suit was filed by a Bank to recover balance due on a note assigned to it as collateral security for loans and to have stock pledged to secure such note delivered to it. The question of *res judicata* hinged upon parties and their privies, not a contract action of like nature as we have in our case. The Court in *Sierk* was concerned with the interest of the assignee of a special tax bill for construction of sewers in an action brought by him. Again, the question of *res judicata* hinged on parties and their privies. In *Farmer,* the Court was concerned with whether or not it was proper to refuse to set aside the appointment of an administrator in probate court. Here also, the question of *res judicata* encompassed parties and their privies.

Our situation in the case at bar is quite unique. The Tructrain Agreement is a master agreement governing thousands of individual shipments. It is therefore, a sever-

able contract. The Illinois courts are clear on their definition of a severable contract: "one that is composed of independent parts, the performance of any one of which will bind the other party pro-tanto". *Chemetron Corporation* v. *McLouth Steel Corporation,* 381 F. Supp. 245 affirmed 522 F.2d 469. "If the part to be performed by one party consists of several distinct and separate items, and prices to be paid by the other party is apportioned to each item to be performed, or it is left to be implied by the law, the contract will generally be held to be severable." *Amsler* v. *Bruner,* 173 Ill. App. 337, (1912) certiorari denied; *Ribidoux* v. *Baltz,* 153 Ill. App. 100 (1910). This is precisely what each bill of lading is under the Tructrain Agreement. Each bill of lading is an independent part, several, distinct and separate. The evidence of the performance of any one of which will lend the other party to a price to be paid by the other apportioned to each item to be performed. Where this is the case, Illinois law provides that the joinder of causes of action is permissive—not mandatory. *Ch. 110, para. 44, Ill. Revised Stats., Illinois Civil Practice Act 1978.*

The test of *res judicata* is whether the same evidence would sustain all actions. *Melohn* v. *Ganley,* 344 Ill. App. 316; 100 N.E.2d 780. Since each shipment is an independent transaction, reason tells us different evidence will be needed to sustain the claim for freight damages and/or charges due on each shipment.

Dulaney v. *Payne,* 101 Ill. 325 (1882) makes the point that where more than one *cause of action* arises under the same contract, the claimant is free to commence separate suits for each cause of action if he so chooses. The Court said (page 332):

> "For instance, A may loan B $6,000.00, and as evidence of a debt take three promissory notes of $2,000 each. Now, while the notes all grow out of one transaction *and one contract,* they are several, and a separate action may be brought on each one of them."

This is Respondent's case. Each shipment, while controlled by the Plan I Tructrain Agreement, is an independent transaction, represented by a separate bill of lading, and a separate set of facts. Therefore, each is a separate cause of action which may be brought independently of other shipments moving under the same Agreement. Chapt. 110, para. 44 of Illinois Civil Practice Act, by its terminology, indicates a claimant has this option. It provides:

> "§ 44. Joinder of Causes of Action and Use of Counterclaims. (1) Subject to rules any plaintiff or plaintiffs *may* join any causes of action, whether legal or equitable or both, against any defendant or defendants; and subject to rules the defendant may set up in his answer any and all cross demands whatever, whether in the nature of recoupment, setoff, cross bill in equity or otherwise, which shall be designated counterclaims."

The language used makes the matter of joinder of different causes of action permissible rather than mandatory. *Chas. Todd Uniform Rental Services* v. *Klysce,* 1961, 30 Ill. App. 2d 274; 174 N.E.2d 570.

Respondent clearly sees that the cause of action rests solely on the divisional agreement. However, involved in that agreement covering thousands of individual shipments are several causes of action. It is evident that there is no identity of subject matter common to the two suits. Nor, do all the claims spring from a common time, a common source, and from one transaction.

Petitioner cites *Consol Builders and Supply Company* v. *Ebens,* 24 Ill. App. 3d 988, 322 N.E.2d 248 (1975), as authority for the proposition that *res judicata* extends to all grounds of recovery or defense which might have been presented. This general rule is not applicable here because the joinder of different causes of action is governed by the Illinois Civil Practice Act, Chapt. 110, Section 44 (1978) which makes joinder permissive not mandatory as stated above. Further, in *Consol,* the original complaint in small claims was for "extras due" and "building materials and labor", the subject matter of the second suit, the issue was declared *res judicata.* Again, distinguishing it from the case at bar.

On page 10 of Petitioner's brief, he cites several cases as authority along with *Consol,* Supra. None of these cases deals with the fact situation peculiar to the case at bar. *Phelps* v. *City of Chicago,* 331 Ill. 80, 162 N.E. 119 (1928); *Prochosky* v. *Union Central Life,* 2 Ill. App. 3d 354, 276 N.E.2d 388 (1971); and *Liberty Mutual Insurance Co.* v. *Duray,* 5 Ill. App. 3d 187, 283 N.E.2d 58 (1972). *Prochosky* dealt with a suit in equity to recover commissions allegedly due, a suit in law was *res judicata,* the suit in equity stands as a bar. *Liberty* was concerned with a suit based on an arbitration declared final on an insurance question, plaintiff was barred from seeking restitution of the same question at law.

The Appellate Court did not rule disregarding the cited authorities, as petitioner insists. The Court properly ruled in reliance on *Turzynski* v. *Liebert,* 39 Ill. App. 3d 87, 350 N.E.2d 76 (1926). In *Turzynski,* although there was one contract for sale, the first suit involved an attempt to obtain injunctive relief from the violation of a restrictive covenant. This was found by the Court to be a separate and distinct right specifically enforceable by its terms. The

breach of contract for failure to deliver certain assets was never litigated and therefore not barred as *res judicata.* (Page 79 and 80 of the Opinion.) That contract clearly gave use to more than one cause of action. The Appellate Court understanding the facts of this matter, saw the relationship of each bill of lading as a separate and distinct cause of action specifically enforceable by its terms.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied and the Illinois judgment should be affirmed.

Respectfully submitted,

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